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Acts As Communications Under The Marital Privilege

*Gutridge v. State*¹

Defendant allegedly assaulted his wife and was taken into custody by the police. While defendant and his wife were being transported to a police station, he slipped a ring of keys into her pocketbook without explanation. Later, in jail, defendant asked a trusty to instruct his wife to pick up the contents of a certain railroad station locker, saying that he did not want the police to discover them. The trusty reported this to the police.² When the police confronted the wife with what they had learned, she produced the keys from her pocketbook, accompanied them to the railroad station and used one of the keys to open the locker for them. They found a bag containing narcotics, which the wife handed over to the officers. Subsequently, defendant was charged with control of narcotics.

At the trial on the narcotics charge, the wife was allowed over objection to testify as to defendant's act of dropping the keys into her pocketbook. The jury brought in a guilty verdict, and defendant appealed on the ground that his act was a confidential communication between a husband and wife and was thus privileged under the Maryland statute.³ Defendant raised an issue which had never been answered in Maryland: To what extent are acts considered confidential communications within the spousal privilege?

The Maryland Court of Appeals held that the wife's testimony concerning the act was not a breach of the privilege covering confidential communications between a husband and wife.⁴ The court stated, "The act of dropping the keys in her handbag, in and of itself, can hardly be deemed a 'communication.' . . . [T]here must be some information transmitted by the act."⁵ In the present case, the court noted that the wife knew only that her husband had given certain keys to her; she did not even know what they fitted until the police informed her.

The privilege protecting confidential communications between a husband and wife is a very old one. Originally, spouses were incompetent to testify for or against each other in any action, civil or criminal. In the middle of the Nineteenth Century, the legislatures in most jurisdictions abolished the rule of marital incompetency, but they

1. 236 Md. 514, 204 A.2d 557 (1964).

2. The court said that since the defendant gave this message to a third party, it was not confidential and therefore was not privileged. It cited in support *Master v. Master*, 223 Md. 618, 623, 166 A.2d 251, 255 (1960) and *McCORMICK*, EVIDENCE § 84 (1954).

3. "In all criminal proceedings the husband or wife of the accused party shall be competent to testify; but in no case, civil or criminal shall any husband or wife be competent to disclose any confidential communication made by one to the other during marriage. . . ." MD. CODE ANN. art. 35, § 4 (1957).

4. 236 Md. at 517, 204 A.2d at 559. The court noted that even if this were a confidential communication, the act here might still fall outside the privilege because it was in furtherance of a crime. See *McCORMICK*, EVIDENCE § 83 (1954), 52 J. CRIM. L. & P.S. 74, 79 (1961); UNIFORM RULES OF EVIDENCE, Rule 28(2)(e) (1953); MODEL CODE OF EVIDENCE, Rule 217 (1942). However, the court found it unnecessary to decide the point in the present case.

5. 236 Md. at 516, 204 A.2d at 559.

preserved by statute the privilege prohibiting a spouse from disclosing confidential communications in court.⁶ In the jurisdictions which did not expressly preserve the privilege by statute, the courts held that the privilege always existed at common law and that the new competency statutes did not affect it.⁷

The exact nature of this privilege for marital communications as it exists today is difficult to define, because many states have legislated independently in this area. The typical statutory marital privilege applies only to confidential communications which are made between a husband and wife while they are married and living together.⁸ The privilege seeks to preserve and foster the confidence between a husband and wife which is essential to the marital relationship.⁹ "Society has a deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status."¹⁰ This goal of domestic tranquility is thought to outweigh any benefits which might be derived from the disclosure of the confidential communication.

The problem raised in the present *Gutridge* case — whether an act is encompassed by the privilege as a confidential communication — has been a troublesome one to the American courts.¹¹ In a few states, the legislators have expressly included acts within the marital privilege,¹² and some courts have said that acts are not within the privilege

6. 8 WIGMORE, EVIDENCE § 2333 (McNaughton rev. 1961); MASS. ANN. LAWS ch. 233, § 20 (1956); N.H. REV. STAT. ANN. ch. 516, § 27 (1955).

7. *William v. Betts*, 11 Del. Ch. 128, 98 Atl. 371 (1916); *Mercer v. State*, 40 Fla. 216, 24 So. 154 (1898); *McCormick v. State*, 135 Tenn. 218, 186 S.W. 95 (1916).

8. CALIFORNIA CODE OF CIVIL PROCEDURE § 1881 (1955); ILL. REV. STAT. ch. 51, § 5 (1959); PA. STAT. ANN. tit. 19, § 684 (1964). Communications made between persons living in unlawful cohabitation or between spouses living in separation are not privileged. 8 WIGMORE, *op. cit. supra* note 6, § 2335. However, the privilege continues to exist after the marriage is terminated by divorce or death. OHIO ANN. CODE § 2317.02 (1953); *Neice v. Chicago & Alton R.C.*, 254 Ill. 595, 98 N.E. 989 (1912); *Prudential Ins. Co. v. Pierce's Admrx.*, 270 Ky. 216, 109 S.W.2d 616 (1937); *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900); *Davis v. State*, 45 Tex. Cr. App. 292, 77 S.W. 451 (1903).

In most jurisdictions the privilege belongs to the spouse who confides the information. CALIFORNIA CODE OF CIVIL PROCEDURE § 1881 (1955); *Dalton v. People*, 68 Colo. 44, 189 Pac. 37 (1920). But the Maryland statute seems to create a disability whereby the privilege belongs to neither spouse, saying that "no . . . husband or wife [shall] be competent to disclose any confidential communication. . . ." MD. CODE ANN. art. 35, § 4 (1957). See Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 MD. L. REV. 16, 17-18 (1955).

9. 8 WIGMORE, *op. cit. supra* note 6, § 2332. See also CALIFORNIA CODE OF CIVIL PROCEDURE § 1881 (1955); *Sexton v. Sexton*, 129 Ia. 487, 105 N.W. 314, 315-16 (1905).

10. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 157 (1898).

11. See generally Annot., 10 A.L.R.2d 1389 (1950).

12. OHIO ANN. CODE § 2317.02 (1953) provides, "The following persons shall not testify in certain respects . . . (C) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness." The Illinois statute originally included within the privilege "any transaction or conversation" between the spouses. ILL. REV. STAT. ch. 51, § 5 (1931). It now includes only a "communication or admission." ILL. REV. STAT. ch. 51, § 5 (1959). See also N.H. REV. STAT. ANN. ch. 516, § 27 (1955). The courts in these states had no difficulty in including acts within the privilege. *Fox v. Fuch*, 241 Ill. App. 242 (1926), states broadly that neither

unless the statute expressly so provides.¹³ It appears, however, that if acts are obviously used as a substitute for words, as when the communicating spouse expressly invites his wife to witness his acts, these courts probably would hold that such acts are privileged.¹⁴ *Guttridge* seems to imply that if the act had been accompanied by words of invitation, a different result would have been reached by the court, since there would then have been "some information transmitted by the act."¹⁵ Thus, the Maryland Court of Appeals might possibly hold that an act would be privileged if the communicating spouse clearly intended that the act be not only confidential but also a communication.

The more liberal courts allow within the privilege other acts done privately in the presence of the spouse. Some of these cases limit the privilege to knowledge made known in reliance on the confidence of the marital relation,¹⁶ but others allow under the privilege any information discovered as a result of the marital relation.¹⁷ However, even the most liberal courts will allow the wife to testify as to information which she learned despite her husband's efforts to hide the information from her.¹⁸ To allow the privilege in this circumstance would defeat its purpose, because it would benefit the husband even though he acted in a manner which would tend to undermine the marital confidence the privilege seeks to preserve.¹⁹

Similarly, certain other types of acts are excluded from the privilege because they do not fall within its policy justification. Acts done in the presence of a third party are not privileged because they presumably are not confidential.²⁰ Testimony as to the fact or act of communicating is likewise not covered by the privilege.²¹ This exclusion exists because the object of the privilege is to protect the communication itself, not the fact that there was a communication.²² Also, harmful acts of the spouse directed against the wife or children are excluded from the privilege.²³

spouse should be allowed to testify for or against the other as to any transaction occurring during marriage. See also *Noyes v. Marston*, 70 N.H. 7, 47 Atl. 592 (1899); *McCague v. Miller*, 36 Ohio St. 595 (1881).

13. *Fraser v. United States*, 145 F.2d 139, 143 (6th Cir.), cert. denied 324 U.S. 849 (1944); *United States v. Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943).

14. Dean Wigmore adopted this test in 8 WIGMORE, *op. cit. supra* note 6, § 2337 saying, "There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written."

15. 236 Md. at 516, 204 A.2d at 559.

16. *Smith v. State*, 198 Ind. 56, 152 N.E. 803, 805-06 (1926); *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172, 174 (1949); *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9, 15 (1949); *State v. Robbins*, 35 Wash. 2d 389, 213 P.2d 310, 313 (1950).

17. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 157 (1898); *Sexton v. Sexton*, 129 Ia. 487, 105 N.W. 314, 315-16 (1905).

18. *Smith v. State*, 198 Ind. 156, 152 N.E. 803, 805-06 (1926).

19. *Ibid.*

20. *People v. Melski*, 10 N.Y.2d 78, 217 N.Y.S.2d 65, 176 N.E.2d 81 (1961); *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9, 15 (1949).

21. *Mullin-Johnson Co. v. Penn. Mutual Life Ins. Co.*, 2 F. Supp. 203 (N.D. Cal. 1933); *In re Pusey's Estate*, 180 Cal. 368, 181 P. 648 (1919); *Whitford v. North State L. Ins. Co.*, 163 N.C. 233, 79 S.E. 501, 502 (1913).

22. See cases in note 21 *supra*.

23. *United States v. Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943); MASS. ANN. LAWS ch. 233, § 20 (1956); CALIFORNIA CODE OF CIVIL PROCEDURE § 1881 (1955); OHIO ANN. CODE § 2317.02 (1953).

The Maryland court in *Gutridge* apparently added an exclusion for acts done in furtherance of a crime in the presence of the spouse.²⁴ Other courts, however, have held that this "criminal" testimony is within the privilege. They feel that a husband is not likely to do a criminal act in public, and, therefore, he must have done the act in reliance on the confidence of the marital relation.²⁵

In the principal case the Maryland Court of Appeals appears to have taken the view that an act cannot be a confidential communication within the marital privilege unless the wife *understood* the information which the husband was trying to convey to her. This approach seems to ignore the basic policy of the marital privilege: to preserve the intimacy which is essential to the well-being of a marriage by encouraging spouses to confide in one another. The question in each case should not be whether the observing spouse understood what the other was trying to say by means of the act, but whether the *communicating* spouse *intended* the act to be a confidential communication. The fact that the defendant in this case did not succeed in his attempt to transmit information to his wife, because she did not understand the significance of his act, should have been immaterial.

24. See note 4 *supra*.

25. *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172, 174 (1949). The following cases do not expressly use the same reasoning but by implication reach the same result: *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9, 15 (1949); *State v. Robbins*, 35 Wash. 2d 389, 213 P.2d 310, 313 (1950).